Supreme Court, U.S.
FILED
FEB 25 1997
CLERK

No. 96-1117

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED MINE WORKERS OF AMERICA 1992 BENEFIT PLAN, and its Trustees; UNITED MINE WORKERS OF AMERICA COMBINED BENEFIT FUND, and its Trustees,

Petitioners,

v.

LECKIE SMOKELESS COAL COMPANY, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

JOHN R. MOONEY
MARILYN L. BAKER
MOONEY, GREEN, BAKER, GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 783-0010

PETER BUSCEMI
Counsel of Record
JAMI WINTZ MCKEON
PAUL D. WELLER
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

DAVID W. ALLEN
BARBARA E. LOCKLIN-GEORGE
UMWA HEALTH AND RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3737
Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONERS

In an effort to avoid review, respondents adopt two strategies. First, they attempt to cabin the significance of the court of appeals' decision, arguing without basis that the decision bears only on so-called "free and clear" sales under Section 363(f) of the Bankruptcy Code. Second, they seek to deny the existence of any conflict with the Second Circuit's decision in *LTV Steel Co. v. Shalala (In re Chateaugay Corp.)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 116 S. Ct. 298 (1995). They do so by mischaracterizing the Second Circuit's holding and by conjuring up a supposed rationale for the *LTV* outcome that not only is nowhere to be found in the Second Circuit's opinion but that has no basis whatever in the Coal Act, the Bankruptcy Code, or any other authority.

Despite respondents' effort to minimize the importance of the decision below, the court of appeals' ruling poses a serious threat to the financial stability of the two statutory trust funds created by Congress in the Coal Act. By

holding that Coal Act tax obligations constitute a single pre-petition claim subject to elimination in bankruptcy, the court of appeals has increased substantially the likelihood that other companies will seek to use the bankruptcy process to avoid their obligations under the Coal Act. This jeopardizes the entire statutory scheme established by Congress. Review by this Court is needed to resolve the conflict in the courts of appeals and to correct the errors below before serious harm is done to the Combined Fund, the 1992 Plan, and the many thousands of retirees, surviving spouses, and dependents that the Coal Act was intended to protect.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH PRIOR LAW REGARDING THE TREATMENT OF TAXES IN BANKRUPTCY.

a. The court of appeals' ruling that future Coal Act taxes constitute a single pre-petition "claim" in bankruptcy ignores the nature of Coal Act obligations. These obligations are exclusively statutory in origin. They are not a "pay back" for pre-petition labor, and they are not the maturation of a pre-petition "right to payment." They are neither accrued nor owed pre-petition simply because the enabling legislation may have been passed before a particular bankruptcy was filed. Like other taxes, they are incurred periodically and are calculated based on factors that change constantly. Accordingly, the only pre-petition component of these obligations would be any obligations actually assessed and due prior to the filing of the petition. There is no basis, legal or logical, on which as-yet uncalculated unassessed, and not-yet-owed premiums can be accelerated and reduced into a unitary obligation, much less a pre-petition obligation.

Respondents fail to cite any authority that supports their contention that future tax obligations can constitute a unitary obligation that can be treated as a "claim" in bankruptcy. Instead, respondents rely on several cases permitting the sale of a debtor's assets free and clear of either: (i) successor liability already incurred by the debtor, or (ii) tax liability already incurred by the debtor.

Each of these cases, however, involved an existing "claim" against, or already accrued "right to payment" from, the debtor.[1] In contrast, respondents in this case seek to sell their assets free and clear of the unincurred potential future tax obligations of the nondebtor asset purchasers. The cases cited by respondents are therefore neither relevant nor controlling.

b. Equally unavailing is respondents' attempt to reconcile the court of appeals' decision with the decision in *LTV* that Coal Act obligations do *not* constitute a single pre-petition claim. *See* 53 F.3d at 498. The court of appeals here sought to distinguish the Second Circuit's decision solely on the ground that the debtor in *LTV* had filed for bankruptcy years before the enactment of the Coal Act. This overlooks entirely *LTV*'s critical holding that Coal Act obligations represent *periodic* taxes that accrue anew each year or each month. Respondents simply ignore, or seek to deny, this important aspect of the *LTV* decision. Respondents acknowledge that the Second Circuit explicitly held that any Coal Act obligations incurred by LTV during the pendency of its bankruptcy qualified as administrative expenses under Section 503(b)(1)(B) of the Bankruptcy Code. Br. in Opp. 11. Respondents then try to pretend, however, that this portion of the Second Circuit's ruling is entirely consistent with the court of appeals' decision in this case. This position is untenable.

Respondents argue that it is "commonplace" for taxes to qualify as administrative expenses incurred by the bankruptcy estate, while, at the same time, constituting a

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[1] *See, e.g., West Virginia State Dep't of Tax & Revenue v. IRS (In re Columbia Gas Transmission Corp.)*, 87 F.3d 982 (3d Cir. 1994) (public utility tax that accrued pre-petition), *cert. denied*, 115 S. Ct. 1793 (1995); *WBQ Partnership v. Virginia Dep't of Med. Assistance Servs. (In re WBQ Partnership)*, 189 B.R. 97 (Bankr. E.D. Va. 1995) (depreciation recapture claim to recover pre-petition overpayments to debtor); *American Living Sys. v. Bonapfel (In re All American of Ashburn, Inc.)*, 56 B.R. 186 (Bankr. N.D. Ga. 1986) (product liability claims existing at time of asset sale and arising from debtor's pre-petition conduct).

single unitary "claim." This contention, which is critical to respondents' effort to harmonize *LTV* with the decision below, is a pure flight of fancy. Far from being commonplace, there is no authority at all for respondents' assertion.

As the Second Circuit recognized in *LTV*, any taxes incurred during a bankruptcy proceeding and before confirmation of a debtor's plan of reorganization are entitled to classification as administrative priority claims under the plain language of Section 503(b)(1)(B) of the Bankruptcy Code. 11 U.S.C. § 503(b)(1)(B). By definition, such an obligation cannot constitute a single pre-petition claim. That is why the Second Circuit ruled that the Coal Act tax obligations that accrue *after* confirmation are not dischargeable under Section 1141(d) of the Code and are the responsibility of the reorganized debtor or any successor or related person under the Coal Act. 53 F.3d at 498.

The Second Circuit thus plainly rejected the notion advanced by respondents that all future Coal Act taxes can be considered a single claim incurred on the enactment date of the Coal Act. If the Second Circuit had adopted respondents' reasoning, then all of LTV's Coal Act obligations would have been payable as an administrative expense on the day the Coal Act was enacted, and the Second Circuit would have had no need to hold, as it plainly did, that LTV's future Coal Act taxes were not dischargeable in bankruptcy. 53 F.3d at 498.

The cases cited by respondents do not support their argument that Coal Act tax obligations constitute unitary claims that are divided into segments in bankruptcy. *Thompson v. IFG Leasing Co. (In re Thompson)*, 788 F.2d 560 (9th Cir. 1986), and *In re Bridgeport Plumbing Products, Inc.*, 178 B.R. 563 (Bankr. M.D. Ga. 1994), concerned the treatment of unexpired leases during the pendency of a bankruptcy. It is well-settled that when a debtor accepts the benefits of an executory contract post-petition and prior to rejection, the debtor must pay for those benefits as administrative expenses of the estate under Section 503(b)(1)(A) of the Bankruptcy Code.

11 U.S.C. § 503(b)(1)(A). If the debtor assumes the contract, it must cure all breaches and abide by the contract terms during the pendency of the case. 11 U.S.C. § 365(b). If the debtor rejects the contract during the pendency of the bankruptcy, any pre-petition breach of the lease gives rise to a claim under Section 365. 11 U.S.C. §§ 365(g), (h). The cases do not involve "a unitary claim divided into segments," and the treatment of executory contracts under the Bankruptcy Code is vastly different from the treatment of taxes, which are covered by provisions other than Section 365.

Respondents also inexplicably attempt to derive support from *Adventure Resources, Inc. v. Holland*, 193 B.R. 787 (S.D. W. Va. 1996), *appeals docketed*, Nos. 96-1557, 96-1938 (4th Cir. July 8, 1996), which held, as the Second Circuit did in *LTV*, that Coal Act obligations incurred during the pendency of a bankruptcy constitute administrative expenses of the estate. The case does nothing to advance respondents' contention that a single "claim" is divisible into administrative expenses and pre-petition components. In fact, the *Adventure* court explicitly declined to resolve the issue of whether Coal Act obligations constitute a single "claim" in bankruptcy. To the extent the court did address the issue, it stated in dictum that it would have concluded that the Coal Act obligations at issue in that case "were simply too removed and attenuated to constitute a pre-petition right to payment." The court made this statement even though the Coal Act was enacted prior to the debtor's bankruptcy filing. 193 B.R. at 794-95. In any event, the *Adventure* court's recognition that Coal Act obligations incurred during the pendency of the bankruptcy are entitled to administrative treatment logically leads to the same conclusion reached by the Second Circuit, *i.e.*, that those obligations cannot be accelerated, collapsed into a unitary claim, and abolished through bankruptcy.[2]

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[2] Because *Adventure* was decided before the Fourth Circuit's decision in this case, no court has yet addressed the impact of the decision here on the *Adventure* holding. Interestingly, however,

II. RESPONDENTS WRONGLY MINIMIZE THE SIGNIFICANCE OF THIS CASE.

Respondents portray this case as nothing more than a narrow dispute about the scope of Section 363(f) of the Bankruptcy Code. Respondents thus ignore the effect of the court of appeals' holding that Coal Act tax obligations constitute a single pre-petition claim in bankruptcy. Respondents simply close their eyes to the predictable consequence that debtors in other bankruptcies will seek to obtain a discharge of their Coal Act obligations based on this decision.

In a footnote, respondents argue that this case is insignificant because it does not involve the question of whether a debtor's own Coal Act obligations can be discharged in bankruptcy. Br. in Opp. 13 n.11. But the one decision cited by respondents does not support their position. *Grady v. A.H. Robins Co.*, 839 F.2d 198 (4th Cir.), *cert. dismissed sub nom. Joynes v. A.H. Robins Co.*, 487 U.S. 1260 (1988), expressly declined to decide whether a liability may be a "claim" for purposes of one aspect of bankruptcy and not a "claim" for purposes of discharge. *Id.* at 203. Moreover, nothing in the decision below supports respondents' suggestion that the court of appeals limited its ruling solely to sales under Section 363(f).[8]

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notwithstanding respondents' suggestion that the holding in this case can be reconciled with *LTV*, the debtors in *Adventure*, who are represented by one of the counsel for respondents here, have advocated openly that the Fourth Circuit's decision here mandates reversal of *Adventure*'s holding that Coal Act taxes incurred by the bankruptcy estate are ongoing administrative expenses.

[8] Respondents' argument that the Trustees will be able to assert claims against the debtors for future Coal Act taxes is specious. The *Leckie* and *Lady H* debtors are liquidating and, in all likelihood, will not even be in existence in the future, much less have assets available to pay their future retiree benefits obligations. Moreover, respondents disregard one of the central features of the Coal Act—Congress's effort to ensure an ongoing funding base for retiree benefits by providing for successor and related person liability. *See* 26 U.S.C. §§ 9704(a)(3), 9706(b)(2), 9711(c), 9711(g)(2), 9712(d)(4) (Coal Act provisions imposing liability on "re-

Respondents also pay scant attention to another important and troubling aspect of this case—the decision by the court of appeals to immunize a nondebtor from future tax obligations. The Bankruptcy Code's protections are intended to benefit only the petitioning debtor. *Landsing Diversified Properties—II v. First Nat'l Bank and Trust Co. of Tulsa (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592, 600 (10th Cir. 1990); *United States v. Huckabee Auto Co.*, 783 F.2d 1546, 1549 (11th Cir. 1986). By extending the protections of the Bankruptcy Code to a nondebtor's future tax liability, the court of appeals has expanded significantly the jurisdiction of the bankruptcy courts, to the detriment of not only the Coal Act but also the tax collection efforts of taxing authorities under other statutes.

III. THE COURT OF APPEALS LACKED JURISDICTION TO DECIDE THE TAX LIABILITIES OF NONDEBTORS.

Respondents contend that the question of the bankruptcy court's subject matter jurisdiction to decide future tax liabilities of a non-debtor under the Bankruptcy Code is not properly before the Court. They maintain that the Trustees waived the right to raise any question regarding the proper application of the Anti-Injunction Act and the Declaratory Judgment Act. Even if the application of those statutes is not jurisdictional and can be waived, however, respondents themselves failed to raise the waiver issue in the court of appeals and thus waived the right to assert it here. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 n.2 (1989); *E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). In any event, the proper application of the Anti-Injunction Act and the Declaratory Judgment Act is not the issue raised in the petition. The more fundamental issue raised

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lated persons"). Congress recognized that some employers would go out of business, but it sought to minimize that problem by mandating that "successors" and "related persons" would remain liable for the signatory operators' obligations.

in the petition is whether a federal court has subject matter jurisdiction to decide, under the Bankruptcy Code, the tax liabilities of a nondebtor who has not sought bankruptcy protection. This Court has held repeatedly that the question of subject matter jurisdiction may be raised at any time. *E.g., Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982); *Andrus v. Charlestone Stone Prods. Co.,* 436 U.S. 604, 607 n.6 (1978).

Respondents' effort to reconcile the court of appeals' decision with the decisions by the Second and Eleventh Circuits is unavailing. Those courts have held clearly that a federal court has no subject matter jurisdiction to decide the tax liabilities of a nondebtor under Section 505 (a) or any other provision of the Code. *Brandt-Airflex Corp. v. Long Island Trust Co. (In re Brandt-Airflex Corp.),* 843 F.2d 90, 95-96 (2d Cir. 1988); *Huckabee,* 783 F.2d 1546, 1549 (11th Cir. 1986).[4]

Contrary to respondents' contention, the district courts in this case rendered declaratory judgments absolving a nondebtor of future tax liability. By their plain language, the district court Orders declare that, as a matter of law, Coal Act successor tax obligations may not be imposed on the persons that sought to purchase assets in the bankruptcy proceedings. The Orders effectively nullify the provisions in the Coal Act that impose joint and several Coal Act tax liability on persons who are deemed successors under the Act, and enjoin the Trustees from determining whether liability should be asserted and, if so,

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[4] *See also Chatman Elec. Servs., Inc. v. United States (In re Chatman Elec. Servs., Inc.),* 82 B.R. 646, 647 (D.C. 1987); *Success Tool and Mfg. Co. v. United States Dep't of Treasury (In re Success Tool and Mfg. Co.),* 62 B.R. 221, 222-23 (N.D. Ill. 1986); *East Wind Indus., Inc. v. Department of Treasury (In re East Wind Indus., Inc.),* 61 B.R. 408, 410-11 (D.N.J. 1986); *United States v. Spector (In re Booth Tow Servs.),* 53 B.R. 1014, 1017-18 (W.D. Mo. 1985); *Newland v. United States (In re Malone Properties),* 150 B.R. 160, 163 (Bankr. S.D. Miss. 1993).

from seeking to collect that liability in the proper manner from the persons that owe it.

Respondents' reliance on *South Carolina v. Regan*, 465 U.S. 367 (1984), also is misplaced. As explained in the petition, any Coal Act successor assessed liability under the statute *would* be able to challenge that assessment.[5] *Regan* thus cannot justify the court of appeals' decision to grant respondents precisely the relief that the Anti-Injunction Act prohibits. And, in any event, *Regan* does not address the fundamental question of whether a federal court has subject matter jurisdiction to decide the tax liabilities of a nondebtor under the Bankruptcy Code.

IV. RESPONDENTS' ASSERTED ALTERNATIVE GROUND FOR AFFIRMANCE IS WITHOUT MERIT.

Respondents argue that the court of appeals' decision could be affirmed on the alternative ground that the third-party purchasers do not qualify as "successors" under the Coal Act. But respondents provide no support for this contention. Although the Coal Act's provisions imposing successor liability may require interpretation in certain cases, the purchasers here seek to buy substantially all of the debtors' assets and to continue mining operations much as before. The purchasers therefore would seem to qualify as "successors" under any reasonable interpretation.[6] This result would be entirely consistent with the Act's remedial purpose of ensuring a stable funding base for coal industry retiree health bene-

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[5] The conclusion by the court of appeals that the purchasers have no mechanism to challenge the imposition of liability is simply wrong. If liability is assessed, they will have the same right as any other company to challenge the basis and amount of the assessment.

[6] We note that the third-party purchaser in *Lady H*, the A. T. Massey Company (through its subsidiaries), currently is seeking to obtain a transfer of approximately $2,000,000 in tax credits from Lady H, on the ground that it is Lady H's successor.

fits. Moreover, the district courts did not consider, and no record was created concerning, whether the purchasers qualify as successors under the Coal Act. The court of appeals thus properly refused to reach this issue.

CONCLUSION

For these reasons, and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. MOONEY
MARILYN L. BAKER
MOONEY, GREEN, BAKER,
GIBSON & SAINDON, P.C.
The Colorado Building
1341 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 783-0010

PETER BUSCEMI
Counsel of Record
JAMI WINTZ MCKEON
PAUL D. WELLER
MORGAN, LEWIS & BOCKIUS LLP
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7190

DAVID W. ALLEN
BARBARA E. LOCKLIN-GEORGE
UMWA HEALTH AND
RETIREMENT FUNDS
4455 Connecticut Avenue, N.W.
Washington, D.C. 20008
(202) 895-3737
Attorneys for Petitioners

February 25, 1997